# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>September 11, 2014 |
| v | No. 316430<br>Grand Traverse Circuit Court |
| TYLER ALLEN SHANANAQUET,<br><br>Defendant-Appellant. | LC No. 2012-011506-FC |

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals by right from his conviction following a jury trial of one count of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(f) (force or coercion; personal injury), two counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(f) (force or coercion; personal injury), and one count of assault with intent to do great bodily harm, MCL 750.84. He was sentenced as a second-offense habitual offender, MCL 769.10, to 25 to 50 years' imprisonment for CSC I, 8 to 22 ½ years' imprisonment for both CSC II counts, and 8 to 15 years' for assault with intent to do great bodily harm. We affirm defendant's convictions but remand for ministerial corrections to the judgment of sentence.

In this case, defendant is accused of viscously beating and raping a 20-year-old woman. The victim met defendant at a bonfire. Defendant offered to give her a ride home in exchange for gas money. When they entered defendant's truck, he grabbed her phone, threw it down, and locked the doors. She asked him to take her home, but he hit her in the face. She said he kept hitting her harder and harder. Defendant tore off her tank top, her pants, and her boots, while she curled up in a ball on the passenger seat. After removing his clothes, defendant put his hands around her neck and began strangling her. She said he fondled her breasts and penetrated her vagina with his penis. She said she would not stop screaming, so he hit her in the face over and again. After the assault, defendant drove the victim home.

Defendant first argues that the lower court erred in admitting the testimony of two former girlfriends under MRE 404(b). This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Adair*, 452 Mich 473, 485; 550 NW2d 505 (1996). A trial court abuses its discretion when it chooses an outcome falling outside the range of principled outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

MRE 404(b)(1) provides as follows:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

The proponent of other-acts evidence must meet three requirements in order to introduce the evidence under MRE 404(b). *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000). First, the evidence must be offered for a proper purpose. *Id.* Second, the evidence must be relevant to a fact of consequence at trial. *Id.* Third, the evidence must not be substantially more prejudicial than probative under MRE 403. *Id.*

Regarding the first requirement, a proper purpose simply is one other than establishing a defendant's character to show his propensity to commit the charged offense. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). Here, the prosecution did not offer the evidence as propensity evidence; instead, the evidence was offered to show defendant's motive. Specifically, the evidence demonstrated that defendant brutally hit the victim during the sexual assault because he gains sexual gratification from having violent sex with women, where the women frequently are in pain. Because this was not propensity evidence, it was offered for a permissible purpose. *Id.* Further, defendant's motive in attacking the victim clearly is relevant in this matter. Last, the evidence did not run afoul of MRE 403. MRE 403 states that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). In arguing that MRE 403 barred admission of both witnesses' testimony, defendant focuses only on the testimony of one of the witnesses, where she stated that while defendant forced her to have anal sex, she lost control of her bowels. While this instance injects some undue prejudice because the jury could give this particular testimony an undue amount of weight due to the sheer salaciousness of it, we cannot conclude that the probative value was *substantially* outweighed by it. We note that just being unfairly prejudicial is not enough to bar admission under MRE 403. Only evidence whose probative value is *substantially* outweighed by unfair prejudice is precluded. The witness described how defendant coerced her into participating in anal sex even though she did not like it and it caused her pain. This was relevant to the purpose of showing defendant's motive of enjoying sexual encounters when the woman was in pain, distress, or discomfort. We cannot conclude that any probative value was substantially outweighed by the risk of unfair prejudice. Accordingly, the trial court did not abuse its discretion in permitting the evidence under MRE 404(b).

Next, defendant argues that the lower court erred in scoring 50 points under OV 7.

> Under the sentencing guidelines, the circuit court's factual determinations are reviewed for clear error and must be supported by a preponderance of the evidence. Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a

question of statutory interpretation, which an appellate court reviews de novo. [*People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013).]

OV 7 addresses aggravated physical abuse. MCL 777.37. Under OV 7, the trial court must score 50 points if the victim "was treated with sadism, torture, or excessive brutality." MCL 777.37(1)(a). Sadism is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." MCL 777.37(3). "[E]xcessive brutality means savagery or cruelty beyond even the 'usual' brutality of a crime." *People v Glenn*, 295 Mich App 529, 533; 814 NW2d 686 (2012), rev'd on other grounds *Hardy*, 494 Mich 430. Thus, the relevant inquiry is whether the defendant engaged in conduct beyond the minimum required to commit the offense. *Hardy*, 494 Mich at 443.

The evidence established that defendant acted with significantly more brutality than required to commit the sexual assault. Defendant repeatedly struck the victim in the face, breaking a bone in her eye, breaking her nose, and chipping a tooth. The injuries left the victim physically and emotionally scared. She testified that she could not see out of her eye for several weeks after the incident, and that she still is unable to breathe through her nose. The violence defendant inflicted upon the victim was heinous and went beyond the "usual" brutality necessary to effectuate first-degree CSC. As a result, the record supported a scoring of 50 points under OV 7.

Defendant also argues that he should not be subject to lifetime electronic monitoring because the lower court did not address the issue at sentencing. Defendant cites no authority for the proposition that the lower court's sentencing decision is void because it was not addressed in the sentencing record. Here, lifetime electronic monitoring was reflected in the felony information and recommended in the presentence investigation report (PSIR). Generally, the lower court is allowed to rely on the PSIR unless sufficiently challenged by the defendant. *People v Grant*, 455 Mich 221, 235; 565 NW2d 389 (1997).

Finally, defendant argues that resentencing is required because the judgment of sentence erroneously indicates the imposition of lifetime monitoring pursuant to MCL 780.520n.[1] The initial judgment of sentence entered on May 16, 2013, indicated that defendant was subject to lifetime monitoring under "MCL 780.520n." As defendant correctly points out, this apparently is a clerical error in the judgment of sentence form since the proper authority is MCL 750.520n. This same clerical error is contained in the revised judgment of sentence that was entered on May 31, 2013.[2] But unlike the initial judgment of sentence, the revised judgment of sentence

[1] Defendant initially claimed two errors, one dealing with the restitution amount and the other dealing with lifetime monitoring under MCL 780.520n. But after the judgment of sentence was modified to reflect a different restitution amount, defendant withdrew that particular claim of error on appeal, leaving the lifetime monitoring issue for this Court to review.

[2] This latter judgment of sentence is still "dated" May 16, 2013, but the trial judge put a date of May 31, 2013, next to his signature on this document.

failed to select the option on the form imposing lifetime monitoring, which was another clerical error.

This Court in *People v Brantley*, 296 Mich App 546, 558-559; 823 NW2d 290 (2012), held that MCL 750.520n(1) *requires* a trial court to sentence a defendant convicted of CSC I to lifetime monitoring, "regardless of the age of the defendant or the age of the victim." Therefore, on remand, the trial court is to amend the judgment of sentence to require lifetime monitoring pursuant "MCL 750.520n." We would recommend that the trial court use the latest judgment of sentence forms (form CC 219b) from SCAO, which have the typographical error corrected.

We affirm defendant convictions but remand for the ministerial tasks of (1) correcting the typo in the judgment of sentence and (2) reflecting the original imposition of lifetime monitoring. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello